IN THE

Supreme Court of the United States

October Term, 1968

No. 63

THE STATE OF OHIO, EX REL. NELLIE HUNTER, ON BEHALF OF THE CITY OF AKRON
Appellant,

v.

EDWARD O. ERICKSON, MAYOR OF THE CITY OF AKRON, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO.

BRIEF FOR APPELLANT

NORMAN PURNELL,
603 First National Tower,
Akron, Ohio 44308.

BERNARD R. ROETZEL,
900 First National Tower,
Akron, Ohio 44308.

ROBERT L. CARTER,
LEWIS M. STEEL,
1790 Broadway,
New York, New York 10019.
Attorneys for Appellant.

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BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of Ohio (App. 47) is reported at 12 Ohio St. 2d 116, 233 N.E. 2d 129.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on December 27, 1967 (App. 47). Notice of appeal to this Court was filed on March 16, 1968 (App. 53), and appellant was granted an extension until April 25, 1968, to perfect this appeal (App. 56). The appeal was docketed on April 24, 1968, and probable jurisdiction was noted on June 3, 1968. Jurisdiction of this Court rests on Title 28, United States Code, Section 1257(2).

Statutes Involved

Ordinance No. 873–1964 provides as follows:

WHEREAS, The population of The City of Akron consists of people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing; and

WHEREAS, These conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of The City of Akron and reducing its productive capacity; and

WHEREAS, The harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues, thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created; and

WHEREAS, Discrimination in housing results in other forms of discrimination and segregation which are prohibited by the Constitution of the United States of America, and are against the laws and policy of the State of Ohio and The City of Akron; and

WHEREAS, Discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of The City of Akron;

NOW THEREFORE, BE IT ENACTED by the Council of The City of Akron:

SECTION 1. DECLARATION OF POLICY.

It is hereby declared to be the policy of The City of Akron, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the City's trade, commerce and manufacturers, to assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin, and to that end to prohibit discrimination in housing by any person or institution.

SECTION 2. To effectuate said policy there is hereby created in the Office of the Mayor a Commission on Equal Opportunity in Housing, which shall consist of five members who shall be appointed by the Mayor for a term of five years each; provided, however, that when the first Commission on Equal Opportunity in Housing shall be appointed under the provisions herein, the members thereof shall be appointed for one, two, three, four, and five years, respectively.

SECTION 3. DEFINITIONS.

As used in this ordinance, unless a different meaning clearly appears from the context, the following term shall have the meanings ascribed in this section:

(a) "Person" means any individual, partnership, association, organization, corporation, legal representative, trustee, receiver, any owner, lessee, proprietor, manager, agent, or employee; any real estate broker, salesman, managing agent, or other person having the right to sell, rent, lease, sub-lease, assign, transfer, or otherwise dispose of a housing accommodation, or having the right to negotiate a sale, rental, lease, sublease, assignment, transfer, or other disposition of a housing accommodation; the state, any of its political subdivisions, or any authority, agency, board, or commission thereof; lending institution regularly en-

gaged in the business of lending money or guaranteeing loans; and other organized groups of persons;

(b) "Housing" means any buildings, structure, or part thereof which is used or occupied, or is intended, arranged, or designed to be used or occupied as the permanent or temporary home or residence of one or more human beings; or any vacant land for sale or lease for housing; provided that housing does not include rental accommodations in owner-occupied dwellings in which the owner, at the time of rental, maintains one of the accommodations as his family residence.

(c) "Unlawful housing practice" means any act prohibited by Section 4 of this Ordinance.

(d) "Discrimination" means any difference in treatment, including segregation, directly or indirectly, because of race, color, religion, national origin, or ancestry.

(e) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing because of race, color, religion, national origin, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, national origin, or ancestry as a condition of affiliation or approval.

(f) *Commission.* The term "Commission" means the Commission on Equal Opportunity in Housing established in the Office of the Mayor pursuant to this Ordinance.

SECTION 4. PROHIBITIONS.

It shall be an unlawful housing practice:

(a) For any person because of race, color, religion, or national origin, or ancestry to:

(1) Refuse to sell, rent, lease, sublease, assign, transfer, or otherwise deny or withhold any housing

to any person, or to refuse to negotiate for any such purpose;

(2) Represent to any person that housing is not available for inspection when in fact it is so available;

(3) Discriminate against any person in the terms, conditions, or privileges of the sale, rental, sublease, assignment, or transfer of any housing or in the furnishing of facilities or services in connection therewith.

(b) For any person to whom application is made for financial assistance for the acquisition, construction, rehabilitation, repair, or maintenance of any housing to:

(1) Make written or oral inquiry as to the race, color, religion, national origin, or ancestry of the person or persons seeking such financial assistance or of prospective occupants or tenants of the affected housing;

(2) Discriminate against any person or persons because of race, color, religion, national origin, or ancestry in the terms, conditions, or privileges relating to the obtaining or use of such financial assistance.

(c) For any person to include in any transfer, rental, or lease of housing any restrictive covenants; or for any person to honor or exercise, or attempt to honor or exercise any restrictive covenant pertaining to housing;

(d) For any person to print or publish, or cause to be printed or published, any notice or advertisement relating to the transfer, rental, or lease of any housing which indicates any preference, limitation, or specification based on race, color, religion, national origin, or ancestry;

(e) For any person to aid, abet, incite, compel, or coerce the doing of any act defined in this section as an unlawful housing practice, or to obstruct or prevent any person from complying with this section or any order issued under this section or to attempt, directly or indirectly, to commit any act defined in this section to be an unfair housing practice;

(f) For any person to induce or solicit a housing listing or transaction by misrepresentations regarding the present or prospective composition of a neighborhood, or the effect of such composition of the neighborhood, where such misrepresentations include a reference to the race, color, religion, national origin, or ancestry of any other person.

SECTION 5. DUTIES OF THE COMMISSION ON EQUAL OPPORTUNITY IN HOUSING.

It shall be the duty of the Commission to:

(a) Initiate or receive and investigate complaints charging unlawful housing practices;

(b) Seek conciliation of such complaints, hold hearings, make findings of fact, issue orders and publish its findings of fact and orders in accordance with the provisions of this ordinance and with the ordinance establishing the Commission;

(c) Render from time to time, but not less than once a year, a written report of its activities and recommendations with respect to fair housing practices to the Mayor and to the City Council; and

(d) Adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this ordinance.

SECTION 6. ENFORCEMENT PROCEDURE.

(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

(b) The Commission shall make a prompt and full investigation of such complaint of an unlawful housing practice.

(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion and upon making a determination of probable cause for crediting the allegations of a complaint filed hereunder, the Commission may direct the Law Director of the City of Akron to commence an action in the Court of Common Pleas within been instituted in the Court of Common Pleas. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant. If the Commission further finds that relief of a final and permanent nature is warranted to eliminate or remedy any unlawful housing practice and to enforce the provisions of this title, it shall direct the Law Director of the City of Akron to prosecute any action or proceedings in the appropriate Court of Common Pleas as may be necessary to obtain such relief and enforcement.

SECTION 7. EXCEPTIONS.

Nothing in this ordinance shall prohibit the sale, lease, rental or transfer of real property or any interest therein as between private parties, provided, however, that such transaction or transactions shall not have the effect of placing the property upon the public or open market, or invite the public to bid upon, offer, or accept an offer for the sale, lease, rental or transfer of such property.

SECTION 8. SEVERABILITY.

The provisions of this ordinance are severable and if any provision, sentence, clause, section or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstance, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the ordinance or their application to other persons or circumstances. It is hereby declared to be the legislative intent that this ordinance would have been adopted if such illegal, invalid or unconstitutional provision, sentence, clause, section or part had not been included therein, and if the person or circumstances to which the ordinance or any part thereof is inapplicable had been specifically exempted therefrom.

SECTION 9. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason that it is desirable to eliminate discrimination in housing at the earliest possible moment, and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

ORDINANCE No. 926–1964 provides:

SECTION 1. That Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby amended to provide as follows:

"SECTION 6. ENFORCEMENT PROCEDURE

"(a) A complaint charging a violation of this ordinance may be made by the Commission itself or by an aggrieved individual.

"(b) The Commission shall make a prompt and full investigation of each complaint of an unlawful housing practice.

"(c) If the Commission determines after investigation that probable cause exists for the allegations made in the complaint, it shall attempt to eliminate the alleged unlawful housing practice by means of conciliation and persuasion. The Commission shall not make public the details of any conciliation proceedings, but it may publish the terms of conciliation when a complaint has been satisfactorily adjusted.

"(d) In any case of failure to eliminate the alleged unlawful housing practice charged in the complaint by means of conciliation or persuasion, the Commission shall hold a public hearing to determine whether or not an unlawful housing practice has been committed. The Commission shall serve upon the person charged with having engaged or engaging in the unlawful housing practice, hereinafter referred to as respondent, a statement of the charges made in the complaint and a notice of the time and place of the hearing. The hearing shall be held not less than ten (10) days after the service of the complaint. The respondent shall have the right

to file an answer to the complaint, to appear at the hearing in person or to be represented by an attorney or any other person, and to examine and cross-examine witnesses. At such hearing the Commission shall have the power to issue subpoenas to compel the attendance of the witnesses and the production of books and papers and other evidence necessary for a determination of the complaint.

"(e) If upon all the evidence presented, the Commission finds that the respondent has not engaged in any unlawful housing practice, it shall state its findings of fact, dismiss the complaint. If upon all the evidence presented the Commission finds that the respondent has engaged or is engaging in an unlawful housing practice, it shall state its findings of fact and shall issue such order as the facts warrant.

"(f) In the event the respondent fails to comply with any order issued by the Commission, it shall certify the case and the entire record of its proceedings to the City Director of Law for appropriate action to secure enforcement of the Commission's order.

"(g) Any person who violates any of the provisions of this ordinance or any rule or regulation adopted by the Commission or who fails to comply with any order of the Commission, shall be subject to a fine not exceeding Fifty and 00/100 Dollars and costs."

SECTION 2. That existing Section 6 of Ordinance No. 873-1964, passed July 14, 1964, be and the same is hereby repealed.

SECTION 3. This ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety, for the reason

that it is desirable to clarify a portion of said ordinance and it is to the best interest of the public that a penalty for violation of said ordinance be enacted; and provided this ordinance receives the affirmative vote of two-thirds of the members elected or appointed to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force at the earliest time allowed by law.

Section 137, Amendment to the Charter of the City of Akron provides:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisements, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

Questions Presented

1. Does the action of the City of Akron, taken by a majority of the electorate through referendum barring the enactment of legislation regulating real property on racial, religious or ethnic grounds, unless and until approved by a majority vote of the city electorate, constitute a forbidden racial classification within the meaning of the Fourteenth Amendment to the Constitution of the United States?

2. Does Section 137 of the Charter of the City of Akron deny to appellant her constitutionally secured right to equal protection and freedom from racial discrimination in her effort to secure adequate shelter within the City of Akron?

3. Does Section 137 of the Charter of the City of Akron restrict the power of the government to protect its citizenry against racial discrimination to such a degree as to involve the state in a substantial way in maintaining and perpetrating racial discrimination in violation of the Fourteenth Amendment?

Statement

This appeal calls into question the constitutional validity of an amendment to the City Charter of Akron, Ohio, which withdraws from the city council power to legislate against racial discrimination in housing and nullifies enforcement of all previously passed fair housing ordinances.

The facts are not in dispute. The City of Akron is an incorporated municipality (App. 2). It is governed by a council having full power and authority to exercise all powers given it by the Constitution of Ohio, the Akron Charter and the General Assembly (Section 27, Charter of the City of Akron, App. 35). These powers, the Ohio Supreme Court has ruled, include the right to pass fair housing legislation designed to protect Negroes and other racial or religious groups from discrimination in obtaining housing. *State, ex rel. Hunter* v. *Erickson,* 6 Ohio St. 2d 130, 216 N.E. 2d 371 (1966).

On July 14, 1964, the Council of the City of Akron, Ohio, enacted fair housing legislation in the form of Ordinance No. 873–1964 (App. 5-13). Pursuant thereto equality of opportunity in housing was promulgated as local public policy. The law declared that many of Akron's multi-racial population "live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing" (App. 5). Such discrimination was found to be injurious to "public safety, public health and general welfare" (*Id.*), was said to compel increased governmental costs, and to cause other forms

of segregation and discrimination prohibited by the Constitution of the United States and by the laws and the policy of the State of Ohio and the City of Akron. The ordinance approved on July 18, 1964, prohibited various forms of racial discrimination in the sale, rental and leasing of housing and established in the Mayor's office a Commission on Equal Opportunity in Housing to administer and enforce its provisions. Thereafter, on July 21, 1964, Section 6 was amended in the form of Ordinance No. 926–1964 (App. 14-16) and approved on July 22, 1964.

On August 25, petitions were filed with the city clerk which resulted in Section 137, proposed as an amendment to the city charter, being placed on the ballots at the general election on November 3, 1964. This provision was passed by the majority of the voters (App. 18).

On January 26 and 27, 1965, appellant, a Negro woman, and for whose benefit it was conceded and stipulated (App. 24) that Ordinances Nos. 873–1964 and 926–1964 were enacted, by affidavit, filed a complaint with the Mayor and the members of the Commission on Equal Opportunity in Housing, alleging that in her effort to secure adequate housing she had been subjected to discrimination, in violation of aforesaid local laws (App. 2-3). The commission, on January 30, refused and declined to process or handle appellant's complaint. Thereafter, on February 1, 1965, a demand was made upon the city director of law to institute mandamus proceedings seeking to compel the commission and the Mayor to enforce the ordinances (App. 3). The city director refused to bring the requested action (App. 3). On February 3, 1965, appellant instituted the present proceedings by filing an original petition for writ of mandamus in the Court of Appeals for the 9th Judicial District, pursuant to Chapter 733.56-733.59 and Chapter 2731 to 2731.02, Ohio Revised Code, seeking to compel performance by respondents, the Mayor and the Commission on Equal Opportunity in Housing, of their official duties as mandated by the two afore-

said ordinances. A demurer to the petition was sustained by the court of appeals (App. 38). On appeal to the Supreme Court of Ohio, that decision was reversed. In effect, the Supreme Court of Ohio held that the fair housing ordinances in question were valid enactments and met state law requirements. See *State ex rel. Hunter* v. *Erickson*, 6 Ohio 58, 2d 130, 216 NE 2d 371 (1966).

On remand to the court of appeals, respondents filed an answer (App. 17-18) admitting the allegations of fact set out herein, but alleging that the adoption of Section 137 as an amendment to the city charter by the majority of the Akron electorate at the November 3, 1964, general election had rendered the ordinances in question inoperative and ineffective. Appellant, in reply (App. 19-23), challenged the validity of Section 137 on state procedural grounds and on the grounds that it constituted a violation of both the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States and conflicted with the rights granted all citizens under Title 42 U.S.C., Section 1982. The cause was thereupon submitted to the court of appeals on the pleadings and stipulations.

On February 8, 1967, that court held Section 137 had been properly placed on the ballot on November 3, 1964; that its terms and enactment by the majority of the electorate were not at variance with either state or federal law; and that by its adoption the fair housing ordinances relied upon by appellant were no longer operative (App. 38-44).

The cause was appealed to the Supreme Court of Ohio, and the lower court judgment was affirmed in a decision entered on December 27, 1967 (App. 47-52). The court distinguished this Court's decision in *Reitman* v. *Mulkey*, 378 U.S. 369. It said that in *Reitman* a state constitutional provision forbade any regulation of individual freedom to sell, lease or rent real property, while here Section 137

placed no such absolute limitation on governmental authority. Further, the court stated that, while voter approval was necessary only in respect to legislation adopted by the city council which seeks to regulate the use, sale, rental or lease of real property on racial and religious grounds, and that Section 137 was, therefore, class legislation, it constituted a reasonable classification under Ohio law and within the meaning of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Thereupon, appellant brought the cause here for review on appeal.

Summary of Argument

By enactment of Section 137, an amendment to the Charter of the City of Akron, the Akron electorate has acted contrary to the restraints of the Constitution of the United States. Not merely has a fair housing measure been repealed, but no future city ordinance "which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry" could be enacted into law without being first approved by a majority of the electors at a regular or general election. No such requirement applies to any other kind of law the council of the city is empowered to promulgate.

Section 137 is constitutionally impermissible because it constitutes an invalid racial classification within the meaning of the Fourteenth Amendment. Such legislation cannot be justified as furthering any legitimate state function. On the contrary, the law in purpose and effect maintains, supports and perpetuates the private anti-Negro prejudices of Akron's dominant white majority in maintaining a ra-

cially restricted housing market, thereby limiting, restricting and denying to black residents of the city access to housing on equal terms with white residents. As such, it cannot stand. *McLaughlin* v. *Florida*, 379 U.S. 184; *Loving* v. *Virginia*, 388 U.S. 1.

What Section 137 does is to freeze the democratic process in favor of the status quo in which non-whites are unable to buy, rent or lease housing outside those areas reserved for blacks. In addition, it is exceedingly difficult, if not impossible, for the Negro citizens of Akron and their allies to ever again succeed in obtaining the enactment of open housing legislation. This was the vice of California's Proposition 14, which the Court struck down in *Reitman* v. *Mulkey*, 387 U.S. 369, and under the rationale of that case Section 137 too must be struck down.

Finally, Section 137 must fall because it conflicts with Title 42, U.S.C. Section 1982 which this Court construed in *Jones* v. *Mayer*, — U.S. —, 36 LW 4661 (decided June 17, 1968), as barring discrimination in the sale and rental of all housing in this country, both public and private. The inability of black Americans to buy housing that white Americans are free to purchase is an incident and relic of the slave status which Congress meant to eliminate by adoption of Section 1982.

ARGUMENT

I

Section 137 Constitutes an Invalid Racial Classification Under Fourteenth Amendment Yardsticks

The paramount issue presented herein is whether the City of Akron has an interest in insulating white home owners from the vicissitudes resulting from the free movement of black Americans in the housing market sufficient to

justify a statutory racial classification. The court below found the requisite justification. It ruled that the Akron city charter could reasonably contain a provision which on its face amounted to a racial classification and in operation served to limit the city council's police powers only in the field of legislation designed to insure Negroes equal housing opportunities (App. 48-49).

Finding that it was reasonable for a municipal corporation to proceed slowly in providing for equal protection for its black citizens because race relations is "an emotionally involved field," the court upheld Section 137, the newly enacted amendment to the city charter from constitutional attack.

While appellant asserts that a charter amendment designed to nullify, delay or insure the defeat of legislation bringing the police power of a municipality to bear on problems of race discrimination cannot conceivably be justified as a reasonable classification,[1] the court below erred first and foremost on the standard applied to judge the constitutional validity of the amendment.

While legislative classifications affecting all members of a class equally can normally be sustained upon a finding of reasonableness, racial classifications may only be upheld where "some overriding statutory purpose" justifies their

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[1] Appellant notes that the court below relied on its earlier decision in Porter v. Oberlin, 1 Ohio St. 2d 143, 152, 205 N.E. 2d 363 (1965), in order to justify its finding of reasonableness. That case, however, merely determined that a fair housing ordinance did not have to address itself to all forms of housing discrimination in order to be sustained. Appellant agrees. But the passage of limited favorable legislation may not be considered on the same footing with the passage of openly hostile legislation or legislation that constitutes a racial classification which does not meet requisite constitutional standards of necessity.

passage. *McLaughlin* v. *Florida*, 379 U.S. 184, 192. See also *Loving* v. *Virginia*, 388 U.S. 1, 11.

Since *Brown* v. *Board of Education*, 347 U.S. 483, signalled the demise of discriminatory racial classifications which legislated differences between the civil rights of black and whites, this Court has universally condemned public laws creating oppressive racial distinctions. See *e.g.*, *Anderson* v. *Martin*, 375 U.S. 399; *Watson* v. *Memphis*, 373 U.S. 526; *McLaughlin* v. *Florida*, *supra*; *Loving* v. *Virginia*, *supra*. Only after a positive showing that a statutory racial requirement serves a legitimate nondiscriminatory purpose, as in the compilation of statistical data for example, has the Court upheld their use. *Tancil* v. *Woolls*, 379 U.S. 19.

Nor has the Court hesitated in setting aside subtlely discriminatory racial classifications. *Anderson* v. *Martin*, *supra*. The defect found in *Anderson*, which involved a challenge to a Louisiana statute requiring the printing of racial designations next to the names of the candidates on election ballots illustrates the inherent constitutional weakness in Akron's charter amendment No. 137. After noting that in the abstract the Louisiana law placed no restrictions upon anyone's candidacy, the Court found that the state nonetheless had furnished a vehicle for racial discrimination, concluding at page 402:

> The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.

Charter amendment No. 137 serves precisely the same purpose in that it operates as a mechanism by which white voters hold a veto over legislation favorable to Negroes. Moreover, Akron's charter amendment is more invidious than the Louisiana requirement condemned in *Anderson*.

Above and beyond inducing racial prejudice at the polls, Section 137's discriminatory effect operates instantaneously upon passage; it negates a fair housing law already on the books, requiring its proponents to wage a political campaign among the general electorate in order to have any possibility of restoring the law. As the Supreme Court of Ohio noted, this liability has been placed upon no other class of persons seeking protective legislation (App. 51).

Not only does the charter amendment fail to accomplish "some permissible State objective, independent of the racial discrimination, which it was the object of the Fourteenth Amendment to eliminate," *Loving* v. *Virginia, supra,* at 11, it serves to deprive Negroes of the opportunity to obtain housing, "a necessary of life." *Block* v. *Hirsh,* 256 U.S. 135, 156. The right of Negroes to obtain housing free from discrimination is a "fundamental right" of such importance that this Court has dispensed with well established rules of standing in order to assure protection. *Barrows* v. *Jackson,* 346 U.S. 249. Last term, violation of this fundamental right was held to be "a relic of slavery" impermissible even in the absence of state action. *Jones* v. *Mayer,* — U.S. —, 36 LW 4661 (decided June 17, 1968).

Despite the decisions of this Court and the passage of additional civil rights legislation in recent years, "some badges of slavery remain today." *Jones* v. *Mayer, supra,* 36 LW at 4671 (Douglas concurring). The existence of Section 137 as an integral component of Akron's city charter is such a remnant of the slave status. Openly and notoriously, it advertises the fact that in the sphere of housing, a basic and indispensable necessity, the rights of blacks depend upon the whims of whites.

No such provision should be allowed to exist in a country that labels itself "open" and "democratic." It should be struck down.

II

Reitman v. *Mulkey* Controls Disposition of This Appeal

Passage of charter amendment 137 and its retention as part of the basic law of Akron, significantly involves that municipality in forbidden state action within the meaning of the Fourteenth Amendment to the United States Constitution. *Reitman* v. *Mulkey*, 387 U.S. 369.

Akron's fair housing ordinances, vitiated by Section 137, were passed only after the city council made a legislative determination that racial discrimination so permeated the municipality's housing market that relief was required on an emergency basis. Both the original legislation and its amendment ordered that the ordinances "shall take effect and be in force at the earliest time allowed by law" because they were passed as "emergency measure[s] necessary for the immediate preservation of the public peace, health and safety." (App. 13, 16). The whereas clauses preceding the initial fair ordinance graphically explain its emergency nature:

> WHEREAS, The population of The City of Akron consists of people of different race, color, religion, ancestry or national origin, many of who live in circumscribed and segregated areas, under substandard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing; and
>
> WHEREAS, These conditions have caused increased mortality, disease, crime, vice and juvenile delinquency, fires and risk of fire, intergroup tensions and other evils, thereby resulting in great injury to the public safety, public health and general welfare of The City of Akron and reducing its productive capacity; and

> WHEREAS, The harmful effects produced by discrimination in housing also increase the cost of government and reduce the public revenues, thus imposing financial burdens upon the public for the relief and amelioration of the conditions so created; and
>
> WHEREAS, Discrimination in housing results in other forms of discrimination and segregation which are prohibited by the Constitution of the United States of America, and are against the laws and policy of the State of Ohio and The City of Akron; and
>
> WHEREAS, Discrimination in housing adversely affects the continued redevelopment, renewal, growth and progress of The City of Akron . . .

More than four years after the city council made a finding that racial discrimination in housing existed within the municipality and declared an emergency to achieve its elimination, Akron not only does not have a fair housing ordinance, but does not even possess the legislative authority to pass one.

The vice of Section 137, as in *Anderson* v. *Martin, supra,* is that it operates to foster the expression of racial prejudice and bias at the ballot box. The electorate of Akron tied the government's hand so that the council could not again successfully enact any fair housing legislation free from veto by the populace. It is true that Section 137 expresses the views of the majority of Akron's electorate, but it is a view that contravenes the guarantees of the due process and equal protection clauses of the 14th Amendment, and, therefore, must fall. *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410; *Brown* v. *Board of Education*, 347 U.S. 483; *Yick Wo* v. *Hopkins*, 118 U.S. 356. See Black, "The Supreme Court, 1966 Term, Foreword, 'State Action,' Equal Protection, and California's Proposition 14," 81 Harv. L. Rev. 69 (1967).

In *Reitman* v. *Mulkey*, *supra*, this Court held a California state constitutional provision, Article I, Section 26, enacted by a majority of the electorate voting in a general state-wide election, offensive to the 14th Amendment. This provision forbade that state from limiting the freedom and absolute discretion of any person to refuse to sell, lease or rent real property to any person he so desires. This case presents substantially the same issue, and it is respectfully submitted, therefore, *Reitman* requires reversal of the judgment below.

More happened here than the repeal of a fair housing ordinance. Proponents of equal housing legislation must not only again steer successfully through the city council a law prohibiting racial discrimination in housing, as they did in securing the adoption of ordinance Nos. 873-1964 and 926-1964. They must do far more. After having succeeded at the city council level, proponents of fair housing must now take the necessary steps to insure the placement of the proposed legislation on the ballot at a general or regular election. Appellant notes that to date even this step has not been undertaken. Assuming placement upon the ballot, proponents then must wage a political campaign sufficient in scope to reeducate an electorate which had previously indicated its adverse views towards fair legislation by approving Section 137.

Thus, hurdles against any future enactment of fair housing legislation in the City of Akron are presently considerably higher, and the prospects of success far dimmer than was the case before Section 137 became law. Indeed, Akron blacks are not only faced with the reality of not being able to muster sufficient strength by resort to the normal democratic process to obtain governmental protection against housing discrimination. Private discrimination in housing is now protected by the government and, therefore, has become in effect the public policy in the City of Akron. In short, what was condemned in

Buchanan v. *Warley*, 245 U.S. 60; *Shelley* v. *Kraemer*, 334 U.S. 1; and *Barrows* v. *Jackson*, *supra*, has now, pursuant to Section 137, become governmental policy in the City of Akron.

It is a fallacy to regard this, as did the court below, as a mere racially neutral decision by the people of Akron for the reason that the regulation of housing on racial grounds is of such special uniqueness that the legislative process in this area may be treated differently than in other fields. By majority vote, the electorate in Akron has enacted private racism into law and, as such, has deprived appellant and all other Negro residents of Akron of the guarantees the 14th Amendment secures.

The court below states that Section 137 is not, as it describes Article 1, Section 26, of the California Constitution, struck down in *Reitman* v. *Mulkey*, *supra*, an absolute prohibition against enactment of future fair housing legislation. Contrary to the understanding of the Ohio Supreme Court, neither was the California law an absolute prohibition against all future fair housing legislation. Equal housing laws could be enacted provided the difficult task of obtaining approval of a constitutional amendment repealing Article 1, Section 26, was accomplished. What Section 137 does (as was true of California's Article 1, Section 26), however, is to stack the cards so heavily against the proponents of equal housing legislation as to seriously impede, if not make all but impossible, the enactment of such legislation through the normal democratic process.

A state cannot clog the democratic progress so as to bring it to a halt without violating its obligations under the Constitution—in this case, its duty to accord to black residents equal protection and due process of law. Here the state has so limited and restricted its authority to protect against private racial discrimination that it has become an active participant in the perpetuation of that discrimination. And in that participation it has violated

the Constitution's command. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Evans* v. *Newton*, 382 U.S. 296. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. For the foregoing reasons, it is respectfully submitted that Section 137 is fatally defective and must fall.

III

Jones v. *Mayer* Requires Reversal of the Judgment Below

Section 137 is in fatal conflict with Title 42, Section 1982, and the decision of the Court in *Jones* v. *Mayer, supra*, requires that it be struck down. As in *Jones*, appellant based her claim in the court of original jurisdiction, *inter alia*, on the theory that Section 1982 had been violated. That section provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Presumably because it was felt that the Fourteenth Amendment questions adequately disposed of the matter, the Ohio courts failed to pass on the appellant's claimed violation of the federal law pursuant to the supremacy clause, Article VI, Section 2 of the United States Constitution. *Testa* v. *Katt*, 330 U.S. 386. Appellant did not raise the applicability of Section 1982 in her jurisdictional statement. The *Jones* case, however has added gloss to Section 1982 and has vindicated appellant's reliance on the statute. Therefore, appellant respectfully requests that her claim that Section 1982 invalidates the charter amendment be considered now. This Court has on prior occasions dispensed with the practice of considering only those questions raised prior to review on the merits. One of those occa-

sions, *Boynton* v. *Virginia*, 364 U.S. 454, 457, duly fits this case, for here as there "[d]iscrimination because of color is the core of the . . . broad constitutional questions presented . . . just as it is the core of the [statutory] question presented to the [state] Court.

The Civil Rights Act of 1866, from which Section 1982 was derived, was intended, this Court found, "to affirmatively secure for all men whatever their race or color . . . the 'great fundamental right,'" including the right to acquire property, free from public or private restraints imposed pursuant to racial discrimination. *Jones* v. *Mayer*, *supra*, at 36 L.W. 4667.

The question raised here, as in the preceding argument, is not whether Section 1982 requires Akron to enact an open housing law or prevents the repeal of such an ordinance. What is clear is that Akron cannot, as Section 137 seeks to do, impede and frustrate Congressional intent that a black and white man in Akron and throughout the United States be on equal terms in the housing market, all other things being equal. Akron has no discretion to proceed slowly to eliminate racial discrimination in this field. Congress by passage of the Civil Rights Act of 1866 had mandated the immediate end of all racial restrictions in housing. Any statute or ordinance which seeks to prevent the state from aiding and supporting this national objective or affirmatively attempts to frustrate Congressional intent must fall.

CONCLUSION

For the reason hereinabove stated, it is respectfully submitted that the judgment of the Ohio State Supreme Court is in error and should be reversed.

NORMAN PURNELL,
603 First National Tower,
Akron, Ohio 44308.

BERNARD R. ROETZEL,
900 First National Tower,
Akron, Ohio 44308.

ROBERT L. CARTER,
LEWIS M. STEEL,
1790 Broadway,
New York, New York 10019.

Attorneys for Appellant.